

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEREK M. DANFORD,

Defendant-Appellant.

UNPUBLISHED

July 21, 2000

No. 214121

Wayne Circuit Court

Criminal Division

LC No. 98-000814

Before: White, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree murder, MCL 750.316(1)(a); MSA 28.548(1)(a), assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1); MSA 28.424(2)(1). The trial court sentenced defendant to concurrent terms of life imprisonment for the first-degree murder convictions, twenty to forty years for the assault conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arose from a shooting at a house in Detroit in which two people died, and a third victim, Alvin Burnett, sustained severe injuries. At trial, Burnett testified that he was lying on the couch in the dining room when he heard the other two victims talking upstairs. Shortly thereafter, defendant, whom Burnett knew as "Dee," came down the stairs with a rifle in his hands. During a brief conversation with one of his accomplices in the kitchen, defendant announced, "it's on," and fired three shots at Burnett at close range, striking him twice. Burnett then heard the sound of footsteps going upstairs, followed by several more gunshots and the sound of people running down the stairs. Burnett then saw defendant and two accomplices leave the house, and he heard a car drive away.

Burnett sought help immediately afterward. When the police arrived, he reported that the shooter's name was "Dee." Later that day, after defendant's arrest, a police investigator visited Burnett in the hospital and presented him with two photographs, one of defendant and the other of defendant's brother. Burnett identified the photo of defendant, who he knew as "Dee," as the shooter.

Before trial, defendant moved to suppress the photo identification on the basis that it was unduly suggestive and because his attorney was not present when Burnett made the identification. At the evidentiary hearing, Burnett testified that when the police investigator asked him if he knew either of the individuals in the photos, he stated that one was “Dee” and that the other was Dee’s brother. Burnett claimed that when he saw the photos he recognized defendant without hesitation. The trial court denied the motion to suppress, finding that the photo display did not rise “to the point of photographic identification” and was merely “a confirmation of who they’re talking about.” On appeal, defendant claims that the trial court erred in failing to suppress the identification testimony. We disagree.

We review a trial court’s decision to admit identification evidence for clear error. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Considering the circumstances, we agree that the “photo display” was not intended as a photographic array for identification purposes. As the trial court observed, the police investigator showed the photos of defendant and his brother to Burnett to confirm that defendant, not his brother, was the person who Burnett knew as “Dee.” Under the circumstances, no danger of mistaken identification existed, given that Burnett already knew defendant and had identified him as the shooter before the police presented the photos to him. In any case, even if the presentation of the two photos was an improper “photographic array,” the record amply established an independent basis for Burnett’s in-court identification of defendant. See *People v Gray*, 457 Mich 107, 115-116; 577 NW2d 92 (1998). Burnett knew defendant for at least one month and defendant stayed overnight at his house two to three times per week. Burnett recognized defendant’s face and voice at the time of the shooting.

Based on the foregoing, we conclude that the trial court did not err in denying defendant’s motion to suppress the identification testimony. Consequently, we reject defendant’s remaining argument that his trial counsel was ineffective for failing to raise the issue of defendant’s right to counsel during the “photographic array.” Because the record below established an independent basis for Burnett’s identification of defendant, we see no reasonable probability that the outcome of the case would have been different. See *People v Pickens*, 446 Mich 298, 302-303, 327; 521 NW2d 797 (1994); *Strickland v Washington*, 466 US 668, 692-696; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Affirmed.

/s/ Helene N. White
/s/ Martin M. Doctoroff
/s/ Peter D. O’Connell